IN THE

Supreme Court of the United States

October Term, 1952.

No. 176

RAYMOND M. CRANE, Doing Business as Associated Fruit Distributors, - *Petitioner,*

v.

JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, and JOHN C. KAZANJIAN, Doing Business as Red Lion Packing Company, - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

I.

OPINIONS OF COURTS BELOW AND OF SECRETARY OF AGRICULTURE.

The order of the Secretary of Agriculture was dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139 (R., pp. 63-79).

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117 (R., pp. 82-137, 139-152).

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962 (R., pp. 164-184).

The decision of the United States Court of Appeals on the first appeal was rendered and filed April 16, 1951, and is reported in 188 Fed. 2d 569 (R., pp. 268-274).

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951 (see 188 Fed. 2d 569) (R., p. 274).

Certiorari was denied by this Court on October 8, 1951, 96 L. Ed. 30, Case 109.

No opinion was written by the Court of Appeals in granting the motion to dismiss the second appeal or in denying the rehearing (Minute Orders, R., pp. 325 and 338).

II.

JURISDICTION.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo*, the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural

Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in Section 240 of the Judical Code, 28 U. S. C. A., Section 1254.

III.

STATUTES AND REGULATIONS INVOLVED.

No statutes, other than the jurisdictional statutes just mentioned, are directly involved in this proceeding.

IV.

STATEMENT OF FACTS.

As a statement of the facts which this Court must consider in passing upon this Petition for Certiorari, we adopt the statement which petitioner sets forth in his Petition for Certiorari under the heading "Summary and Statement of Matters Involved," beginning on page 2 of his Petition with the following exception. Where petitioner says (top page 6) that Denunzio's Brief on the first appeal shows that the only question "presented or decided" was as to the validity of the contract under the Emergency Price Control Act, we

can only agree that this shows it was the only question *seriously urged* at that time.

We do not feel that any of the facts related under the heading of "III, Statement of Facts" (page 13, Petitioner's Brief in Support of Petition for Writ of Certiorari) are pertinent to the question which this Court is called upon to decide at this time; hence we do not now undertake to affirm or contradict any of the statements therein set forth. However, we do not wish to be understood as intending to waive the right to add to or contradict such Statement of Facts, should certiorari be granted.

V.

QUESTIONS INVOLVED.

Did the Court of Appeals for the Ninth Circuit err in dismissing the appeal taken by Crane, and in denying rehearing of said matter?

To answer this question, it is necessary to decide whether the judgment appealed from was appealable, which, in turn, depends upon whether such appeal raised any questions which were not and could not have been decided on the previous appeal and the previous Petition for Certiorari.

VI.

REASONS RELIED UPON FOR DENIAL OF WRIT AND SUMMARY OF ARGUMENT.

Respondent contends that the Writ of Certiorari should be denied for the following reasons:

(1) The mandate of the Court of Appeals for the Ninth Circuit directed the District Court to set aside the judgment of Judge Carter and to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor (R., p. 273). Since the latter judgment manifestly disposed completely and fully of the entire cause, the mandate, by derivation so to speak, had the same effect and left nothing to be determined by the District Court. The judgment entered by the District Court was thus, in effect, the judgment of the Court of Appeals and could not be appealed to the same Court.

(2) The decision and mandate of the Court of Appeals was in no way erroneous insofar as it undertook to dispose of the entire cause, and not confine itself to ruling on the issue which Judge Carter had determined adversely to plaintiff. Defendant, in the first place, had perfected a cross-appeal from so much of the judgment as determined the facts adversely to him, and, in the second place, the entire record was before the Court, and this included a transcript of all the evidence adduced by either side upon a complete trial of all the issues, coupled with complete findings of fact and conclusions of law by the judge who heard the case.

(3) Even if the mandate of the Court of Appeals was erroneous to the extent that it ordered the reinstatement of Judge O'Connor's judgment (which we strenuously deny), that error in turn could have been, and should have been reviewed and corrected by this Court in passing on the previous Petition for Writ of Certiorari.

(4) The questions sought to be raised herein are not of sufficient importance or gravity to require granting the writ.

VII.

ARGUMENT.

POINT 1. The District Court's Judgment Was Not Appealable Since It Followed the Mandate of the Court of Appeals.

When the first appeal was presented to the Court of Appeals, it found the record in this situation: Judge O'Connor, who had heard the case, had held:

(1) That there was a contract,

(2) That it ws valid and enforcible,

(3) That the facts concerning its breach were substantially as contended by the plaintiff (respondent here), and

(4) That plaintiff was entitled, on the law, to a judgment for a specified sum of money.

Subsequent to Judge O'Connor's death, his successor, Judge Carter, in ruling on defendant's motion for a new trial, found the contract to be invalid, or unenforcible, as in violation of the Emergency Price Control Act of 1947, and hence, he (properly enough, granting the premise) set aside Judge O'Connor's judgment and dismissed the complaint. Plaintiff appealed from this judgment and defendant cross-appealed, and the entire record, including the transcript of evidence, went up.

In this situation, the Court of Appeals was faced, as we see it, with three basic alternatives. It could (1) agree with Judge Carter that the contract sued upon was unenforcible as being in violation of the Emergency Price Control Act, in which event, his order dismissing the complaint was manifestly proper; it could (2) disagree with his conclusion of law on that point, but either conclude that the facts (or some other question of law involved) were against plaintiff, or that there was not sufficient evidence to determine those questions and remand for further proof; or it could (3) disagree with Judge Carter and concur with Judge O'Connor, not only on the question of the enforcibility of the contract, but on all facts found and questions of law decided by the latter. It is clear that where the record on appeal is complete and contains appropriate findings of facts and conclusions of law, the appellate court on reversal may direct the entry of a final judgment. *Sanderson* v. *Portal Life Insurance Company of New York*, 87 F. 2d 58 (10th Cir. 1937); *Lydon* v. *New York Life Ins. Co.*, 89 F. 2d 78 (8th Cir. 1937); *Maryland Casualty Company* v. *United States to use of Heyward*, 108 F. 2d 784 (4th Cir. 1940); *Amende* v. *City of Bremerton*, 36 Wash. 2d 333, 217 P. 2d 1049 (1949). The last cited case seems particularly analogous to the situation presented here, and we quote from the decision (217 P. 2d at page 1054):

> "The trial court, as indicated above, determined at the first hearing that the sum of $1,990.00 consisting of principal on the sixteen bonds and

> interest at the rate of seven per cent per anum as called for in the bonds, was owing to appellant. The trial court also determined at that time that there had been sufficient proceeds from the sinking fund sales to pay this sum. The original findings and conclusions to this effect were not carried forward into the 'corrected' findings of fact and conclusions of law entered after the second hearing. No additional evidence or argument was received at the second hearing bearing upon the amount due appellant or the extent of the diversions. It is therefore clear that the only reason these recitals were not included in the 'corrected' findings is that they were not pertinent to the issues relative to the filing of a claim and the running of the statute of limitations, which issues the trial court, at the second hearing, considered controlling. As previously noted, the finding as to the extent of the misapplication of sinking fund profits was based upon an agreed exhibit. *For these reasons, we believe that this case may be disposed of without the necessity of taking further evidence or the entry of additional findings of fact and conclusions of law.*" (Emphasis added.)

The court then directed the entry of a judgment based on the original findings and conclusions, having previously found error in the trial court's ruling on the Statute of Limitations question.

Having concluded, as it did, that Judge Carter's principal conclusion was erroneous, it seems obvious that, to dispose of the case, the Court of Appeals necessarily had to select one of the two latter alternatives mentioned above.

In fact, it selected the third; and in so doing, it is clear that it fully and finally determined all the issues in the case, both law and fact, in favor of the plaintiff (respondent here). The findings and conclusions of Judge O'Connor were adverse to the defendant at all points and fully and finally disposed of the case. It is, in essence, from these findings and conclusions that defendant is now attempting to appeal. But the mandate of the Court of Appeals directed the District Court to reinstate those findings and conclusions, thus by any reasonable interpretation, affirming them. It is almost too well settled to admit of argument that a judgment entered strictly in accordance with the mandate of an appellate court is not subject to a second appeal. *Stewart* v. *Salmon,* 97 U. S. 361, 24 L. Ed. 1044; *Humphrey* v. *Baker,* 103 U. S. 736, 26 L. Ed. 456; *Aspen Mining and Smelting Company* v. *Billings,* 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986; *United States* v. *New York Indians,* 173 U. S. 464, 19 S. Ct. 464, 43 L. Ed. 769. In one case, *Great Northern Railway Company* v. *Western Union Telegraph Company,* 174 Fed. 321 (8th Cir. 1909), the Court stated the principal rather clearly, saying:

> ". . . when an appellate court definitely describes the decree to be entered in the Court below, there is no discretion in the latter court; but it is its duty to obey the mandate and enter the decree accordingly. The decree when entered in the court below according to the mandate, *is the decree of the appellate court,* and an appeal from it will be dismissed for it would be in effect an appeal

to the appellate court from its own decree." (Emphasis added.)

It is well recognized, of course, that second appeals will lie where it is alleged that the mandate has not been properly executed, *The Lady Pike,* 96 U. S. 461, 24 L. Ed. 672; or where questions were left open by the mandate or decision of the appellate court on the prior appeal. *Ex Parte Union Steamboat,* 178 U. S. 317, 20 S. Ct. 904, 44 L. Ed. 1084; *Hinckley* v. *Morton,* 103 U. S. 764, 26 L. Ed. 458; *Re Sanford Fork and Tool Company,* 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414. Neither of these situations, however, are present in the instant case, although it will be noted that the cases just cited are the principal ones cited and relied upon by petitioner in support of his present position. This brings us to the second point.

POINT 2. The Court of Appeals Did Not Err in Directing the Type of Judgment To Be Entered.

Although it is nowhere expressly stated in petitioner's brief, it is clearly his argument that at the time of the first appeal, the findings and conclusions of Judge O'Connor were not properly before the Court of Appeals. This is implied by his persistent statement that "the questions now sought to be reviewed were not and could not have been reviewed by the Court of Appeals on the Denunzio appeal" (Petitioner's Brief, p. 17, Point D) and by his citation of the *Union Steamboat* and *Sanford* cases, *supra.* As to the "were not," the short answer is that they manifestly were,

since the mandate ordered the reinstatement of, and thus affirmed, Judge O'Connor's findings and conclusions, the correctness of most of which is the very question "now sought to be reviewed." As to the "could not have been," petitioner *assumes* that, and goes on to argue that hence they are now reviewable. Were his premise only correct, his conclusion would be inescapable. But a faulty premise is the defect in many an otherwise unassailable syllogism..

If Judge O'Connor had reached the same conclusion that Judge Carter later did as to the invalidity or unenforcibility of the contract sued upon, and dismissed the complaint without hearing the factual issues, it is quite true that, upon plaintiff's appeal from that judgment, the facts and the other legal issues (in other words, anything not decided by Judge O'Connor) would not have been before the appellate court. *Campbell* v. *Campbell*, 313 Ky. 249, 203 S. W. 2d 913 (1950). It would then have had only two alternatives: (1) affirmance, or (2) reversal with remand for trial on the merits. Had the latter been selected, an appeal by the losing party would have been proper after the trial. But that, of course, was not the situation when the case reached the Court of Appeals for the first time. Judge O'Connor had heard an exhaustive trial of the issues tendered, and had entered exhaustive findings and conclusions with respect thereto, all of which, together with the transcript of evidence which formed the basis therefor, was in the record which went up to the Court of Appeals. The mere fact that the issue of enforcibility of the contract under the Emergency Price Con-

trol Act, *supra*, was felt by counsel for both sides to be the primary issue at that time, as reflected in their briefs, could not operate to deprive the Court of Appeals of jurisdiction to determine any other questions properly before it. It was an essential part of Judge Carter's judgment (which, it is true, was technically the judgment appealed from) that Judge O'Connor's findings and conclusions be set aside. The Court of Appeals in ruling on the correctness or incorrectness of Judge Carter's judgment was manifestly called upon to determine the correctness of Judge O'Connor's findings and conclusions, and it would be absurd, we feel, to argue that, because of the technicality that it was Judge Carter's judgment being reviewed, the Court of Appeals was bound, if it reversed, to remand for new trial without considering whether or not there were any errors in the record of the former trial which had been conducted. This record, as petitioner admits (Petition for Certiorari, p. 7), was before the court. After all, there must be an end to litigation some time.

POINT 3. Had the Court of Appeals Erred in Directing the Type of Judgment To Be Entered, This Court Could Have Corrected Such Error on the First Petition for Certiorari.

Finally, even if there were an error in the mandate of the Court of Appeals on the first appeal in directing the judgment to be entered, surely such an error was as much subject to the review of this Court as any other which might have been committed by the Court of Appeals. *Panama R. Company* v. *Napier Shipping*

Company, 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004. Consequently, in denying the Petition for Writ of Certiorari on the first occasion, this Court in effect affirmed the decision of the Court of Appeals on all points—not only those which petitioner expressly raised, but all those which could have been raised. In other words, the "law of the case rule" arises as a bar to the granting of certiorari in this instance, since that rule says that the decision and mandate of this Court on the previous Petition for Certiorari are conclusive on a second Petition as to all issues which were or *could have been* raised on the first Petition. *United States Trust Company* v. *New Mexico,* 183 U. S. 535, 22 S. Ct. 172, 46 L. Ed. 315. We do not feel that this argument is in any way in conflict with the long line of cases holding that denial of certiorari constitutes no expression of opinion on the merits and creates no precedent. (Cases cited under Annotation 17, 28 U. S. C. A. 1254.) That rule is a part of the doctrine of *stare decisis,* while we are here contending for an application of the doctrine of *res adjudicata.*

POINT 4. This Petition Fails to Present Any Grave Question.

The issues which petitioner asks this Court to order the Court of Appeals to review, viewed in the light most favorable to petitioner, do not involve any questions other than the purely private rights of the parties as between themselves. No public questions, important or otherwise, are involved, there is no conflict shown between the various circuits, and none of the factors which traditionally induce this Court to grant certiorari are present.

CONCLUSION.

In conclusion, we will summarize our argument as briefly as possible.

(1) The issues now sought to be raised were considered and disposed of on the previous appeal in the Court of Appeals.

(2) The action of the Court of Appeals in considering and determining on the previous appeal the issues now sought to be raised was proper.

(3) If the Court of Appeals were in error in considering and determining on the previous appeal the issues now sought to be raised, that error could and should have been corrected by this Court when it was previously petitioned to grant a writ of certiorari, and its order denying certiorari has concluded that question along with those which were then expressly raised.

Accordingly, certiorari should be denied and it is respectfuly so moved.

ELI H. BROWN III,
CHARLES B. TACHAU,
Counsel for Respondent,
Joseph Denunzio Fruit Company.

BROWN, ELDRED, BROWN & TACHAU,
Of Counsel.